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IN THE

Supreme Court of the United States

OCTOBER 1971 TERM

No.

MICHAEL BECKMAN,

Petitioner,

against

WALTER KIDDE & COMPANY, INC. and FYRE-SAFETY INC.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 31, 1972

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Question Presented

In this antitrust case, the District Court and the Circuit Court of Appeals for the Second Circuit found that the petitioner [to quote from the *per curiam* decision of the Circuit Court of Appeals, Chief Judge Friendly and Circuit Judges Waterman and Smith sitting] "failed to raise genuine issues as to the existence of any material fact entitling plaintiff to a trial"; and petitioner did not and cannot show that these findings were erroneous as a matter of law. In such case, does the petition present any of the reasons identified by Rule 19 of the rules of this Court as being so "special and important" that a writ of certiorari will be granted as a matter "of sound judicial discretion"?

Statement of the Case

Respondents are compelled to make a further Statement of the Case because that of petitioner is inadequate and not a fair and accurate statement containing (in the words of Rule 23(e) of the rules of this Court) "the facts material to consideration of the questions presented".

As a matter of fact, the petitioner's Statement could not have been drafted with the objective of compliance with Rule 23(e), for it is a word for word copy of the first six paragraphs of its "Statements of Facts" contained in his brief submitted to the United States Court of Appeals.

An adequate, fair and accurate statement of the facts is set forth in the opinion of the Trial Judge, an opinion which the Circuit Court of Appeals characterized as "comprehensive", as follows:

> "Plaintiff, Michael Beckman, entered into a written Regional Distributorship Agreement with the defendant Fyre-Safety, Inc.,[1] whereby Beckman was granted the exclusive right in certain New York counties to sell fire alarm systems manufactured by the defendants. At the same time Fyre-Safety entered into an oral understanding with Beckman granting Beckman the right to purchase from Fyre-Safety fire extinguishers purchased from the co-defendant, Walter Kidde & Company, Inc.[2] In March, 1967, the defendants refused to sell any more fire extinguishers to Beckman. Claiming that both defendants and their distributors or other 'businessmen' had conspired to restrain and monopolize com-

[1] Fyre-Safety, Inc. was a wholly-owned subsidiary of Walter Kidde & Company, Inc., which ceased doing business on December 31, 1967.

[2] Beckman claims that the right to purchase Kidde fire extinguishers was an oral term of the written distributorship agreement. The defendants assert that Beckman was permitted to purchase the extinguishers as a matter of courtesy. Resolution of this dispute is not here required.

merce in violation of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§1[3] and 2,[4] Beckman brought this action for treble damages and reasonable attorney's fees. He now moves for summary judgment upon these claims, and the defendants cross-move for the same relief. The facts as set forth in Beckman's pleadings and affidavits are susceptible of a brief exposition.

After the execution of the written franchise agreement and the oral agreement with respect to fire extinguishers, Frye-Safety, in March, 1967, refused to continued to sell Beckman fire extinguishers which they had previously supplied. Beckman asserts that this refusal to sell was pursuant to a conspiracy with distributors or businessmen and therefore constitutes a *per se* violation of the Sherman Act. The allegation of conspiracy first appears in the complaint wherein Beckman alleges that 'on or about the 8th day of March, 1967, the defendant, WALTER KIDDE & COMPANY, INC., entered into an agreement with its distributors of fire extinguishers other than the plaintiff wherein and whereby it was agreed that the plaintiff would be denied the right to make further purchases of the Walter Kidde line of fire extinguishers.' In his affidavit in support of his motion for summary judgment Beckman's only reference to a conspiracy is his description of the cause of action as one 'to recover damages under Sections 1 and 2 of the Sherman Act upon the ground that the defendants conspired with other businessmen to deprive the

[3] Section 1 provides in pertinent part:
"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

[4] Section 2 provides in pertinent part:
"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

plaintiff of access to merchandise which the plaintiff had been previously selling and renting to members of the general public.'

Kidde and Frye-Safety do not contest the contractual background and the refusal to sell but strongly dispute Beckman's allegation that Frye-Safety refused to ship to Beckman because of a conspiracy. In support of this position, the defendants submitted the affidavit of William R. Yocom (the National Sales Director for Frye-Safety in the years 1966 and 1967), wherein he states that he is thoroughly familiar with the facts of the case and that he categorically denies the existence of any conspiracy. He further deposes that Frye-Safety was always willing to sell fire extinguishers to Beckman but that Beckman refused to pay Frye-Safety's price increase for the extinguishers. Yocom further avers in his affidavit that 'Fyre-Safety was a small company, Kidde itself does not dominate the fire extinguisher field, and plaintiff could easily have purchased fire extinguishers from any number of companies some smaller and some larger than Kidde.' Beckman does not dispute this latter statement.

• • •

Defendants submitted a second affidavit by William R. Yocom which *substantiates* in greater detail their position that the refusal to deal was not pursuant to a conspiracy and that no factual, and hence no triable issue, existed on this claim. Specifically, he states that Fyre-Safety made an independent business decision on the basis of its cost analysis that it could not continue profitably to supply its customers with fire extinguishers without a price increase, that the decision was made without consultation with any distributor, competitor, or any other person, that the increase was applied equally to all distributors who wished to purchase fire extinguishers, and that at all times it was willing and indeed anxious to sell the plaintiff or any other customers fire extinguishers at the increased price." *(Italics ours)*

ARGUMENT

This case presents no special and important reasons which, as a matter of sound judicial discretion, justify the granting of a writ of certiorari. None of the guideline or illustrative reasons set out in Rule 19 are present here:

- This is no appeal from a decision by a state court involving a decision by it of a federal question of substance or from a state court's decision which was decided in a way probably not in accord with the applicable decisions of this court. (Here the decision of the Court of Appeals is not in conflict, but is in conformity, with the decisions of other circuits on the same matter.)

- The decision below did not decide an important state or territorial question in a way in conflict with applicable state or territorial law.

- No important question of federal law was decided below which has not been, but should be, settled by this Court, nor has the decision below determined a federal question in a way in conflict with applicable decisions of this Court. (On the contrary, the decisions below are based on well-settled precedents.)

- There was no departure here from the accepted and usual course of judicial proceedings or the sanctioning of such a departure by a lower court so as to call for an exercise of this Court's power of supervision.

Affirmatively stated, the petition before this Court should be dismissed because the court below did no more than rightly to decide a case on the merits and on the basis of precedents of this Court and of well-established decisions by lower courts enunciating principles recognized in every circuit in the land.

When the petition is analyzed, basic misconceptions of substance and procedure are revealed. The procedural misconception is clearly outside (to quote from Rule 19) "the character of reasons" which will be considered by this Court and is peculiarly appropriate for a decision by lower courts. These considerations involve nothing more than the well-known bases on which summary judgment is either granted or denied. The District Court (see pp. 7a-9a of Appendix B to the petition herein) stated these 'non-Rule 19' considerations succinctly as follows:

> "The purpose of a summary judgment is to screen out sham issues and 'to discover whether one side has no real support for its version of the facts,' (*Community of Roquefort* v. *William Faehndrich, Inc.*, 303 F.2d 494, 498 (2d Cir. 1962)), and 'summary judgment cannot be defeated by the vague hope that something may turn up at trial.' *Perma Research and Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969); see *Radio City Music Hall Corporation* v. *United States*, 135 F.2d 715 (2d Cir. 1943); *Jones* v. *The Borden Company*, Slip Op. No. 28278, 5th Cir., July 15, 1970. Following the caveat of the Court of Appeals that 'there may be some instances where summary judgment is too blunt a procedural device for deciding difficult cases. See for example, *Miller* v. *General Outdoor Advertising Co.*, 337 F.2d 944 (2d Cir. 1964)' (*Perma Research and Development Co.* v. *Singer, supra*, at 578; *Dolgow* v. *Dillon*, Slip Op. No. 711, 2d Cir., September 2, 1970), the court deferred its decision on the motion and offered to set down the application for a hearing one month thereafter, on June 10, 1970, in order to enable Beckman to establish, if possible, any specifics or facts in support of the existence of the conspiracy or the restraint of trade alleged as a *per se* violation of Section 1. See Rule 43(e), Fed. Rules Civ. Proc., 28 U.S.C.; 6 Moore's Fed. Prac. ¶56.11(7). During this interlude Beckman would have had ample opportunity, by means of discovery, to identify any dis-

tributors or others who were parties to the alleged conspiracy and to supply some evidence indicating in what manner there had been a restraint of trade.

Although in his papers he formally cried out for discovery, Beckman rejected the court's overture with its accompanying opportunity and, instead, relied upon the sufficiency of the complaint and affidavits already submitted. It was the court's inclination to immediately grant summary judgment in favor of the defendants. However, to remove any doubts as to whether any triable issue existed, the court then requested both parties to submit additional affidavits supporting their respective positions, which they did. Beckman submitted two additional affidavits but neither of them indicates that there exists a genuine issue as to a material fact necessary to defeat a summary judment motion.[5]

Upon examination of the pleadings and the affidavits submitted by both parties, together with Beckman's refusal to resort to any further discovery proceedings, the court is convinced that there is no genuine issue as to a material fact with respect to the alleged violation of Section 1 of the Sherman Act."

Petitioner's misapprehensions concerning the governing substantive law have also been comprehensively and correctly dealt with by the District Court. What it called "Beckman's misapprehension of the governing law" [page 16a of Appendix B to the petition herein] flows, it is respectfully submitted, from a basic failure to perceive that this case involves a mere and legitimate refusal by a trader to sell a commercial product to a buyer because the buyer refuses to buy the product except at the price in effect before a price increase. This refusal to sell is so characterized as mere and legitimate because, as the Trial Court

[5] The first one is by Beckman's attorney and merely argues that although Fyre-Safety was a wholly-owned subsidiary of Walter Kidde & Company, Inc., it nevertheless operated independently. The other affidavit, sworn to by Beckman, is addressed to a point not relevant to the issues presently before this court.

found, and as the Circuit Court confirmed, it is unaccompanied, *in fact,* by any contract, combination or conspiracy in restraint of trade.

This pervasive and basic misconception by the petitioner has as its progeny reliance by him on a number of cases which deal with the 'illegitimate' situation of a refusal to deal in the context of contract, combination or conspiracy in restraint of trade. These inapposite cases are specifically dealt with by the District Court, and soundly distinguished, in its opinion attached to the Petition herein as Appendix B. This Court is respectfully referred to that opinion, particularly that part thereof (pp. 11a, 12a, and 13a of Appendix B) which deals with cases on conspiracy between parent and subsidiary; also that part (page 14a of Appendix B) which explains the inapplicability here of the cases involving classes of combinations which are illegal *per se,* for example, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207 (1957) and the exclusive franchise in non-monopoly lines of commerce cases (page 14a of Appendix B).

Once petitioner's basic and pervasive misapprehension of the essential nature of the present case is understood, then it is also understood that while cases involving combination, conspiracy, etc. are not in point, the cases dealing with a refusal by a trader acting alone to sell his product to another, are in point.

Before citing these cases which are in point, certain facts which were before the Trial Court, and are in its opinion, should be specifically mentioned in the interests of preventing any misconception regarding the nature of this case.

ONE. This is not a franchise case, for the franchise covered fire alarm systems and the alleged refusal to deal relates to fire extinguishers, a different product not the subject of petitioner's franchise. (Pages 3a and 4a of Appendix B)

Two. Respondent Frye-Safety is a small company. Respondent Kidde does not dominate the fire extinguisher field and plaintiff and petitioner could easily have purchased fire extinguishers from any number of companies, some smaller and some larger than Kidde (page 6a of Appendix B). Respondent Fyre-Safety made an independent business decision on the basis of its cost analysis that it could not continue profitably to supply its customers with fire extinguishers without a price increase; the decision was made without consultation with any distributor, competitor, or any other person; the increase was applied equally to all distributors who wished to purchase fire extinguishers; and at all times it was willing and indeed anxious to sell the plaintiff or any other customer fire extinguishers at the increased price (page 9a of Appendix B).

THREE. As the Court found (page 6a of Appendix B): "Following the alleged refusal to sell on March 8, 1967, Beckman terminated his distributorship agreement with Fyre-Safety by means of a letter dated April 12, 1967, written by his attorney, in which no mention was made that the termination was in any way due to defendants' refusal to sell or to any conspiracy." This action is thus a patent afterthought, a mere tactic, having no roots in the merits.

Returning now to the precedents which are in point on the facts as they were found by the Trial Court to exist:

At common law before the enactment of the Sherman Act it was within the seller's discretion to accept or reject a buyer and this right was preserved, not altered, under the Sherman Act. As was stated in the case of *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 F. 46, 49 (2nd Cir. 1915):

> "Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer for any reason that appealed to him. It might be because he did not like the other's business methods,

> or because he had some personal differences with him, political, racial or social. That was purely his own affair with which nobody else had any business. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customer is made for him by the Government."

Four years later in the landmark case of *United States* v. *Colgate,* 250 U. S. 300 (1919), the Supreme Court affirmed the result in *Great Atlantic* and stated at page 307:

> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged or who wish to engage in trade and commerce, in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly the act does not restrict the long recognized right of trader and manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

Recent cases continue to uphold the principle that, absent a showing of conspiracy or attempt to monopolize, a mere refusal to deal is not a violation of the Sherman Act. In *Johnson* v. *J. H. Yost Lumber Co.,* 117 F. 2d 53 (8th Cir. 1941), for example, defendant distributors were held to be not in violation of the Sherman Act for a refusal to sell to plaintiff. The Court stated at page 61;

> "It must be borne in mind that one engaged in private enterprise may select his own customers and in the absence of an illegal agreement may sell or refuse to sell to a customer for good cause or for no cause whatsoever."

In fact, as *Johnson* indicates, the Clayton Act itself, 15 U.S.C.A. Sec. 13, specifically provides:

> "That nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

The seller's right to select customers extends even where the marketed goods are the subject of a trademark. In *Hoffman* v. *Riverside and Dan River Cotton Mills,* 55 F. Supp. 13, 15 (S.D.N.Y. 1944), the court stated:

> "I know of no authority which says that a manufacturer of a product sold under a trade name cannot acting alone and under the circumstances here disclosed pick his customers and refuse to sell to those who for any particular reason he does not care to do business with."

It is also clear that a manufacturer's refusal to sell will not in and of itself give rise to an inference of conspiracy. In *Johnson,* the Court stated at page 61:

> "From the mere fact of refusing to sell to plaintiffs there can thereafter arise no inference of an unlawful agreement because one may lawfully select his own customers. There must be substantial evidence furnishing some basis from which the alleged fact of such an agreement may reasonably be inferred."

In fact even though the courts afford plaintiffs wide evidentiary latitude to prove a conspiracy, a bare refusal to sell does not even qualify as circumstantial evidence: In *Hoffman,* the plaintiff, as in this case, buttressed a conspiracy charge on defendants' refusal to sell to plaintiffs while selling to others.

The court rejected plaintiffs' contention of conspiracy and stated at page 16:

> "It is true that under the law, a conspiracy cannot and does not have to be established by direct evidence.

> The court has the right to look to the conduct of the parties and their acts under all the circumstances. The court cannot open the minds or the heads of the parties charged with a conspiracy and definitely say and determine what their intentions were. But before we can find there was such a combination as charged here, there must be some concrete evidence from which the court can draw the proper and necessary inference to establish the conspiracy. But the evidence here considered as a whole, and in the light most favorable to the plaintiff, and considering the witnesses, their manner and demeanor on the stand, wholly fails to meet that test."

CONCLUSION

For the reasons stated the Petition for a Writ of Certiorari should be in all respects denied.

Respectfully submitted,

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